

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
Implementation of Section 621(a)(1) of)	
the Cable Communications Policy Act of 1984)	MB Docket No. 05-311
as amended by the Cable Television Consumer)	
Protection and Competition Act of 1992)	

COMMENTS OF LEE COUNTY, FLORIDA

These Comments are filed by Lee County, Florida (hereinafter referred to as the “County”) in response to the Federal Communications Commission’s (hereinafter “FCC” or “Commission”) Notice of Proposed Rulemaking (“Cable Franchising NPRM” or “NPRM”).¹ The NPRM specifically addresses the implementation of Section 621(a)(1) of the Communications Act of 1992, which provides that “A franchising authority...may not unreasonably refuse to award an additional competitive franchise.”² Lee County has not unreasonably refused to award additional competitive cable franchises. In fact, the County has encouraged and sought additional competitive cable providers, since competition promotes low cable rates and because competition enhances customer service among competitors.

It is the County’s position that local governments are the most qualified entities to ensure the proper issuance of cable franchises for new entrants into the video services field on a timely basis, while ensuring the achievement of Congressionally-stated policy goals, including responsiveness to local community needs. In support of this position, the County would like to inform the Commission about the recent history of cable television franchising in the County’s jurisdiction, and to respond to certain positions taken and questions posed by the Commission in its NPRM.

Introduction

The local cable franchising process promotes competition by giving equitable opportunities to *all providers* who want to use the rights of way to provide video service. Creating an exception for telephone companies that want to offer video service, by exempting them from requiring a franchise agreement, creates an unnecessary competitive advantage for these companies. Local cable franchising ensures that providers are permitted access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not

¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-189, Notice of Proposed Rulemaking (released November 18, 2005).

² See 47 U.S.C. §541(a)(1).

unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that the County's local community's specific needs are met and that local customers are protected. Without the franchising process, the County would be unable to provide this important supervisory function.

Congress did not intend for the Commission to preempt or supersede local government's franchising authority. Congress delegated specific powers to local franchising authorities which are not anti-competitive as some new entrants assert. The Cable Act acknowledges that municipalities are best able to determine a community's cable-related needs and interests. Accordingly, it would not be appropriate for the Commission to question the County in its identification of such needs and interests. The House Report states:

It is the Committee's intent that the franchise process take place at the local level where County officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.³

Furthermore, in *Union CATV v. City of Sturgis*, the Court concluded that, "judicial review of a municipality's identification of its cable-related needs and interests is very limited. A court should defer to the franchising authority's identification of the community's needs and interests..."⁴ There is no reason in fact or law supporting the Commission's implementation of a different standard from that of the court. Thus, franchising should remain at the local level and any unreasonable denials should be reviewed by the judiciary.

The County has an interest and the right, delegated by Congress to prevent economic redlining, to establish and enforce customer service standards and to ensure the provision of adequate public, educational and governmental access channel capacity, facilities or financial support. Furthermore, for the minority of communities that may abuse their authority, the solution is not to undermine the entire franchising process. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.⁵

3 See H.R. REP. NO. 98-934, at 24, reprinted in 1984 U.S.C.C.A.N. at 4661.

4 See *Union CATV v. City of Sturgis*, 1997 FED App. 0075P (6th Cir.).

5 The County's franchising process ensures that customer service complaints, in most cases are handled within 24 hours or at the most, within 72 hours. The County has a rapport with the cable operator to ensure that issues are resolved. This type of relationship is a direct result of the local franchising process. It is inconceivable that a state or federally held franchise with dispute resolution maintained at the state or federal level is going to be comparable to the current service standards in the County. Finally, the Commission does not have the staff, budget or resources for handling complaints in such a timely manner.

The Franchising Process

Initial Franchise

Cable service cannot be provided unless there is a cable franchise granted by the franchising authority.⁶ “Franchise” means the “*non-exclusive*” right granted by the County to a Franchisee in a Franchise Agreement to construct, maintain and operate a Cable System to provide Cable Services under, on, and over Streets, roads and any other public ways, rights-of-ways, or easements within all or specified areas of the County...”⁷ The County is empowered by the cable television regulations of Title 47 of the United States Code to act as a Local Franchising Authority (LFA) with all of the powers and authority that status provides, including but not limited to negotiating and granting cable television franchises.

The public policy is that cable television regulations should include franchise procedures and standards which encourage the growth and development of cable systems and assure that cable systems are responsive to the needs and interests of the local community; and should promote competition in cable communications and minimize unnecessary regulation of cable systems.⁸ Accordingly, an LFA may not unreasonably refuse to award a competitive cable television franchise.⁹

A cable franchise functions as a contract between the local government, operating as the local franchising authority, and the cable operator. Like other contracts, its terms are reasonably negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process. However derived, whether requested by the local government or offered by the cable operator, once the franchise is approved by both parties the provisions in the franchise agreement function as contractual obligations upon both parties.

The County is authorized to regulate the construction, installation, operation and maintenance of Cable Television Systems pursuant to federal, state and local law. The County's franchise provides that changes in law which affect the rights or responsibilities of either party under the Franchise agreement will be subject to and shall be governed by the Communications Act, and any other applicable provision of federal, state or local law.

Public Hearing

Local government officials encourage competition and new technologies since competing technologies and companies result in tangible benefits to the County and its residents. Public hearings provide an opportunity for residents, government officials and providers to voice their interests and concerns.

Florida law requires that no local government may grant a cable franchise unless it does so after holding a public hearing in which it considers the economic impact upon private

⁶ See 47 U.S.C. §541(d).

⁷ Lee County Cable Ordinance No. 01-05 (“Cable Ordinance”).

⁸ See 47 U.S.C. § 521.

⁹ See 47 U.S.C. § 541(a)(1).

property, the public need for the franchise, the capacity of the public rights of way to accommodate the system, the present and future use of the public rights of way to be used by the cable system, the potential disruption to existing users of the rights of way, the financial ability of the franchise applicant to perform, societal interests generally considered in cable television franchising, and any other substantive or procedural matters which may be relevant to consider.¹⁰

While a franchise is negotiated by the local government as a contract, the process provides the cable operator additional due process rights, and consequently additional obligations on the local government. For example, following is the County's process with respect to granting an Ordinance or Franchise agreement:

Staff requests the Board of County Commissioners to consider a Public Hearing to adopt an ordinance or franchise agreement on a specific board date; this step takes a minimum of 10 business days. When this request is presented to the Board the public can and often makes comments regarding the item.

After the Board grants permission for a Public Hearing an advertisement announcing the Public Hearing is placed into a local newspaper with the highest area circulation. This ad usually runs 2 consecutive weeks before going to the Board. The draft documents are available for public inspection during this period.

The Board considers the item at a Public Hearing, usually at 5:00 PM so the public can attend. Before Board discussion public input is taken. The Board discusses the item that results in a vote to approve or deny. The Board can also direct staff to obtain additional information or direct changes in documents. If this is requested a second public hearing is required.

Local Franchising/Local Oversight

If telephone providers, such as SBC, AT&T and Verizon are permitted to offer cable service without first obtaining a cable franchise from an LFA, these providers will be exempt from local oversight and will be less accountable to the local communities in which they operate than the cable systems with which they will be competing. This would be competitively unfair and harmful to local communities and their residents who would lose the ability to manage the rights of way. Such local oversight provides important consumer and public protections.

The County is the most familiar with the local needs of its residents. Establishing and ensuring compliance with local building and zoning codes, and public safety regulations are performed at a local level. For example, the County's Cable Ordinance provides,

Except to the extent required by law, a Franchisee shall, at its expense, protect, support, temporarily disconnect, relocate, or remove, any of its property when required by the County by reason of traffic conditions, public safety, Street construction, Street resurfacing or widening, change of Street grade, installation or sewers, drains, water pipes, power lines, signal lines, tracks, or any other type

¹⁰ See Fla. Stat. § 166.046(2).

of municipal or public utility improvements; provided, however, that the Franchisee shall, in all such cases, have the privilege of abandoning any property in place. Franchisee shall do so at its expense to the extent other users of the rights-of-way are so responsible, consistent with applicable law.¹¹

Additionally, in order to manage the rights of way for vehicles, pedestrians and utility-type providers, the County's Cable Ordinance requires that the cable operator keep full and complete plats, maps and records showing the exact locations of its facilities located within the public Streets, ways, and easements of the County.¹²

Accordingly, the Commission cannot bypass the County's franchising process by considering establishing rules applicable only to telephone companies seeking to use the County's rights of way to offer a video product. The effect of these rules would be to usurp the statutory process established by Congress for cable franchise renewals to ensure that local needs are met.

Florida's Level Playing Field Statute

The public policy of the State of Florida is that cable television LFAs should grant overlapping franchises under terms and conditions which are not more favorable or less burdensome than those of other franchises.¹³ Furthermore, section 166.046(5) provides "Nothing in this section shall be construed to prevent any...city considering the approval of an additional cable service franchise in all or any part of the area of such...city from imposing additional terms and conditions upon the granting of such franchise as such...city shall in its sole discretion deem necessary or appropriate."

Both of the County's Franchise agreements state that the Franchisee's right to use and occupy the Streets shall be *non-exclusive*, and the County, in accordance with applicable law, reserves the right to grant a similar Franchise or other use of said Streets, or any portions thereof, to any Person, including the County, at any time during the term of the Franchise Agreement. In the event a future franchise is granted for the area served by the Franchisee, any such Franchise *shall be granted consistent with the standards established in Fla. Stat. 166.046(3)*.

Cable Franchising in Lee County, Florida

Community Information

Lee County has a population of approximately 514,295 people. The County's franchised operators are Comcast and Time Warner Cable, Inc. On November 8, 2005, the County consented to the sale and assignment of the Time Warner cable television Franchise to MOC Holdco II, Inc., a subsidiary of Comcast Corporation.

¹¹ See Lee County Cable Ordinance No. 01-05 ("Cable Ordinance").

¹² See Id.

¹³ See Fla. Stat. § 166.046(3).

Competitive Cable Systems

As a result of mergers, acquisitions and the consummation of the transfer from Time Warner to Comcast, Comcast will be the only Franchisee. Thus, the County does not have competitive cable systems. Over the past decade, the County had multiple franchises. However several different Comcast entities, Comcast Cablevision of West Florida, Inc., Comcast Cablevision of South, Inc. and Comcast Cablevision Corporation of California, LLC acquired the other providers. Most recently, Florida Cablevision Management Corporation D/B/A Time Warner Cable, Inc. was transferred to Comcast.

Time Warner/Comcast Franchise

The County renewed its Franchise with Time Warner in December, 2002, for a term of fifteen years, which expires in December, 2017. Under the statutory timeline laid out in the Federal Cable Act, the cable operator has a 6-month window beginning 36 months before the expiration of the franchise in which to request a renewal under the Federal Act. As a result, at this time, the County is not currently negotiating a franchise renewal with Time Warner/Comcast. Since Comcast will be the only cable operator in the County as a result of the transfer from Time Warner to Comcast, the County required that all of the subscribers are interconnected so that all of the subscribers have access to the same services.

Comcast Franchise

The County renewed its Franchise with Comcast in June, 2002, for a term of twelve years, which expires in December, 2014. As a result, at this time the County is not currently negotiating a franchise renewal with Time Warner/Comcast.

Customer Service

Because service issues are local, customer service must be handled at the local level. These complaints are made and addressed within the community. There are thousands of customer service complaints across the country, which are addressed at the local level. The State or the Commission is simply not equipped with handling the sheer number of these customer service complaints.

Both of the County's Franchises provide that the Franchisee agree to comply with and to implement and maintain any practices and procedures that may be required to monitor compliance with customer service requirements set forth in the County's Cable Television Ordinance. The Ordinance requires specific information relating to the Franchisee's full schedule and description of services, service hours and location of the customer service office of the Franchisee or offices available to Subscribers, and a schedule of all rates, fees and charges for all Cable Services provided over the Cable System.¹⁴

¹⁴ Lee County Cable Ordinance No. 01-05 ("Cable Ordinance").

Below are several customer service obligations which help the County ensure that the cable operator is treating the residents in accordance with federal standards and the terms agreed to in its Franchise. Both the Time Warner and Comcast Franchises provide that the Franchisee is held to the standards outlined in the County's Cable Ordinance.

A Franchisee shall at a minimum maintain all parts of its system in good condition and in accordance with FCC standards or such more stringent standards provided in this Ordinance or a Franchise Agreement. Sufficient employees shall be retained to provide safe, adequate and prompt service for all of its customers and facilities, as set forth in this Ordinance and a Franchise Agreement. The customer service requirements set forth herein are applicable to all services subject to the Ordinance. Franchisee's failure to comply with this subsection may result in a fine in the amount of Two Hundred Fifty (\$250.00) Dollars, per violation, per day or part thereof that the violation continues.

A Franchisee shall maintain at least one (1) conveniently located business office and service center within the County limits. The office shall make available for all customers sufficient covered waiting areas and adequate seating capacity in an air conditioned space. Such office must have adequate counter personnel to keep wait time to a reasonable length. Franchisee's material failure to comply with this subsection may result in a fine in the amount of Two Hundred Fifty (\$250.00) Dollars per violation, per day or part thereof that the violation continues.

Franchisee shall develop written procedures for the investigation and resolution of all Subscriber or County resident complaints, including, but not limited to, those regarding the quality of service and equipment malfunction, which procedures shall be provided upon request to the County Administrator. The good faith or lack thereof of the Franchisee in attempting to resolve Subscriber and resident complaints in a fair and equitable manner shall be considered in connection with the renewal application of the Franchisee, to the extent consistent with applicable law. Franchisee shall maintain a complete list of all complaints received during the prior twelve (12) months, requiring a service call not resolved within seven (7) days of receipt and the measures taken to resolve those complaints. This list shall be provided to the County upon request. Franchisee shall also maintain a list of all written complaints received, which list shall be available to the County upon request. Franchisee's material failure to comply with this subsection may result in a fine in the amount of Two Hundred Fifty (\$250.00) Dollars per violation, per day or part thereof that the violation continues.

Upon reasonable request by the County, Franchisee shall permit the County Administrator or his/her designee to inspect and test the technical equipment and facilities upon reasonable notice not to be less than two (2) business days, and accompanied by an employee of the Franchisee. Franchisee's material failure to comply with this subsection may result in a fine in the amount of Three Hundred

Fifty (\$350.00) Dollars per violation, per day or part thereof that the violation continues.

Responsibility for the administration of this Ordinance, and any Franchise granted pursuant to this Ordinance, and for the resolution of all complaints referred to the County against a Franchisee regarding the quality of service, equipment malfunctions, and related matters, is hereby delegated to the County Administrator (who can in turn designate to a County employee), who is empowered, among other things, to settle, or compromise any controversy arising from operations of the Franchisee, on behalf of the County, in accordance with the best interests of the public. In cases where requests for service have been ignored or in cases where the service provided is unsatisfactory for whatever reason, the County Administrator or designee, hereafter referred to jointly as County Administrator, shall have the power to require the Franchisee to provide service consistent with the terms of the Franchise, if in the opinion of the County Administrator or designee such request for service is reasonable. Any Person aggrieved by a decision of the County Administrator, including the Franchisee, may appeal the matter to the Board for hearing and determination. The Board may accept, reject or modify the decision of the County Administrator. No adjustment, settlement, or compromise, whether instituted by the County Administrator or by the Board shall be contrary to the provisions of this Ordinance or any Franchise Agreement issued pursuant to this Ordinance, and neither the County Administrator nor the Board, in the adjustment, settlement, or compromise of any controversy shall have the right or authority to add to, modify or delete any provision of this Ordinance or of the Franchise, or to interfere with any rights of Subscribers or any Franchisee under applicable federal, or state Law or private contract.

Franchisee may appeal any decision of the County Administrator or his/her designee directly to the Board within thirty (30) days of notice of the decision to the Franchisee.

Intentional material misrepresentation by a franchisee in any response to a notice of proposed credit, refund and/or fine, whether oral or written, shall be considered a material breach of the Franchise Agreement, subject to a penalty of no less than Five Thousand (\$5,000.00) Dollars in liquidated damages to the County, and shall be grounds for Franchise revocation.

PEG

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, that channel capacity be designated for public, educational, or governmental use, channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.¹⁵

¹⁵ See 47 U.S.C. § 531(b).

Accordingly, LFAs have the right to establish franchise requirements regarding channel capacity for government and education access programming. Furthermore, an LFA may require assurances that the cable provider will provide adequate educational and government access channel capacity, facilities, and financial support.

The County requires the cable operator to provide capacity for public, educational, and/or governmental ("PEG") access channels on the cable system. The County currently has two (2) full-time government access channels, one for educational access and one for government access. Pursuant to the Franchise agreement with Time Warner, the County is entitled to a second government access channel for the County's exclusive use, provided certain usage conditions are met. PEG channels are extremely important to the County and the residents of Lee County.

The County's Ordinance requires that PEG channels be supported in the following ways by the cable operator:

The County and a Franchisee shall agree in a Franchise Agreement that a Franchisee provide access channels, facilities and other support for education and/or governmental use as determined by the County.

Upon request of the Board, cablecasting of Board meetings live to all Subscribers located within the County shall be carried by the Franchisee on a government access channel.

Federal law specifies that communities can only require money to be used for facilities, not operations. Consistent with federal law, the Comcast agreed to pay the County a capital grant of \$100,000.00 for PEG equipment, facilities and other capital requirements. Comcast also agreed, that upon written request from the County, Comcast will cablecast up to 2,000 Public Service Announcement ("PSA") spots per year during the term of the franchise. These PSA spots equate to approximately \$30,000.00 annually at approximately \$15.00 per spot. Comcast, pursuant to FCC rules, passed the Capital Grant through to Subscribers:

For the sole noncommercial support of Governmental Access equipment, Franchisee shall collect as a Subscriber pass-through an amount equal to five cents (\$.05) per month per Subscriber throughout the Term of this Franchise Agreement. Remittance of such subscriber pass-through shall be made to the County on a quarterly basis throughout the Term.

1. Franchisee may list this amount as a specific line amount on its monthly bills to its Subscribers.

2. The County may increase this amount no sooner than the third (3rd) anniversary of this Franchise Agreement and no more often than every 3 years thereafter; provided that (i) any such increase will not be more than five cents (\$.05) at any given three (3) year period, and (ii) the total per Subscriber, per month pass-through shall never exceed fifteen cents (\$0.15) during the Term of

this Franchise Agreement, and (iii) the County may only increase the monthly subscriber pass-through amount after first holding a public hearing on the matter where both the public and Franchisee may be heard on the issue after providing Franchisee with forty-five (45) days notice of the Board of County Commissioners' approval of such increase.

3. Comcast agrees to provide a semiannual report of its Subscribers to verify the quarterly "Governmental support" payment or collection to the County.

I-NET

The County's Franchise agreement with Comcast provides the following I-NET provision: Franchisee agrees that upon written request from the County, it shall construct an Institutional Network ("I-NET") within the County or interconnect with any existing I-NET.

Service to Schools & Government Buildings

Pursuant to their Franchise agreement, Comcast agreed to provide one free high-speed cable modem and high speed cable Internet service to each of the ten Government facilities chosen by the County.

With respect to service to government facilities and service to schools, the Franchise agreement between Time Warner and the County provides:

County Government Facilities: Franchisee agrees to provide one (1) cable drop per location (including installation and Basic and Expanded Basic Cable Service) without charge, to each government building in the Franchise Area that is receiving service on the effective date hereof or any such building that is within two hundred (200) feet of Franchisee's coaxial distribution plant, whether now in existence or constructed during the term of this agreement. Notwithstanding any of the foregoing, any County facility shall continue to be provided with no less than the level of free Cable Services and the number of free cable outlets as that which existed on the Effective Date of this Franchise Agreement unless inconsistent with applicable law or Franchisee's contractual obligations.

School Commitments: Where Franchisee's plant: (a) is the closest franchised cable operator to any K-12 public school and, (b) is within 200 feet of Franchisee's coaxial distribution plant; and (c) meets the density requirements set forth in Section XIV B. of the Ordinance, Franchisee hereby agrees to provide, one free cable drop and installation, and free Basic Cable Service at no charge to those schools, as listed in *Exhibit A*, attached hereto for informational purposes only. Any K-12 public and/or Non-Public Schools constructed after the Effective Date hereof shall, upon written request, be provided with installation at no more than Franchisee's direct cost. However, where Franchisee receives reasonable prior written notice of the construction of a new school and where such new school is within 200 feet of Franchisee's coaxial distribution plant, Franchisee

shall cooperate with the builder to install all cable-related facilities during construction so as to allow for activation of Cable Services simultaneous with occupancy of the school. If any internal wiring installation is requested to serve additional outlets in any school, it will be provided at no more than Franchisee's actual cost.

The County's Ordinance contains the following requirements:

Schools: A Franchisee shall, upon request, provide at least one cable television service outlet and when technically feasible and available in the area from franchisee, or its affiliate, parent or subsidiary, serving subscribers within the area served by the system, at least one standard installation connection to a cable on-line service, including a minimum of at least one (1) cable modem, to each public elementary and secondary school within its franchise area that is passed by its cable system, and shall provide basic cable service and on-line cable internet service to those installations at no cost to the County or school involved, and shall charge no more than its time and material costs for any additional cable service outlets (including cable internet service) to such facilities.

Government Buildings: A Franchisee shall, upon request, provide at least one standard installation for basic cable television service to each and every County government building within its franchise area that is passed by its cable system and shall provide basic cable service to those installations at no cost to the County and shall charge no more than its costs for any additional basic cable service outlets to such facilities.

Build Out

Build out requirements ensure that there is a simple, objective, easily administered test of economic feasibility as to where cable service has to be available. Having a clear test helps to ensure that the cable company's facilities are extended into all neighborhoods meeting this test and that service is offered to all residents in such neighborhoods, regardless of race, age, income or other extraneous factors.

Since the test must be locally tailored so as to take into account local geography, demographics, and other factors which affect population density and ability to provide service, a test applied statewide or nationally would be ineffective. Since the rights of way are public property, maintained using public funds, the rights of way cannot be used in a discriminatory fashion. It is the County's responsibility to ensure that public property is used to provide service wherever there is sufficient population density.

Finally, the County has a duty to ensure that modern communications services are offered broadly to as large a number of the residents of the County as reasonably possible, without regard to age, race, and income or other improper service criteria.

The County's Franchise provisions were negotiated with the cable operator, taking into consideration the cable operator's business needs, engineering and construction requirements and the need to provide access to service on a non-discriminatory basis. The Franchise agreement requires that the cable operator currently provide service to the following areas of the County:

Within twenty four months from the date of issuance of an initial franchise or the extension of a service area, the Franchisee shall accomplish construction of the proposed Cable System within said service area where the density is at least twenty-five 25 homes per required cable mile, so as to make available all services to all dwellings and business. Such period may be extended by the Board for good cause shown. Notwithstanding anything to the contrary, a franchisee shall be neither required to overbuild nor prohibited from overbuilding the facilities of another cable operator to comply with the requirements of this section.

A franchisee shall, at all times during the term of a franchise provide to the County as built maps of the Cable System. Upon request, of the County, said maps shall be provided in a format to be reasonably approved by the County staff.

State-of-the Art

A Franchise entered into ten or fifteen years ago, no longer meets the needs of the County as the demographics have changed. In order to ensure that the County's residents have access to current telecommunications technologies, the County's Ordinance contains the following upgrade provisions:

"State-of-the-Art" means that level of cable system technical performance, capacity, equipment, components and service (without reference to the content of service) equal to that which has been developed and demonstrated to be generally acceptable and used in systems of comparable size, excluding Tests, and which is technically and commercially feasible on the Franchisee's system.

Notwithstanding anything herein to the contrary, when reasonably practicable but no later than twelve (12) months after notice from the County, a franchisee shall make such technically and commercially feasible improvements to its System as may be necessary to bring the System to the State-of-the-Art, as defined in Section II (A)(30). The availability of a specific level of Cable System technical performance, capacity, equipment, components and service (without reference to the content of service) on any Cable System owned or operated by the Franchisee, its parents, affiliates or subsidiaries serving a community in the State of Florida shall create a presumption of technical and commercial feasibility, provided, however, the Franchisee may make a showing to the contrary which, if sufficient, may overcome the presumption. Such showing shall be made to the Board, which shall determine whether a showing of competent and substantial evidence sufficient to overcome the presumption has been made, subject to a challenge to such determination in an appropriate legal proceeding. The County may grant extensions of the time within which a Franchisee must comply with the

obligations set forth herein, to accommodate the process to be afforded a franchisee hereunder, for good cause shown (including evidence that the Franchisee has commenced necessary measures to comply with the obligations herein), but in no event to exceed twelve (12) months.

Any Cable System that commences construction, including but not limited to initial construction, rebuild, upgrade, or reconstruction or is granted a franchise or renewal after the effective date of this Ordinance shall have a minimum capacity of at least 750 MHZ providing no less than seventy-eight (78) video channels available for immediate use. A Franchise Agreement may provide for a larger minimum channel capacity requirement.

Insurance and Security/Bonding Requirements

The County has a duty to protect its residents by ensuring that obligations are met and injured members of the community are compensated if the provider should encounter financial difficulties or file for bankruptcy. The County's Ordinance contains the following insurance and bonding requirements:

Insurance Coverage: Within thirty (30) days after the effective date of the franchise, the Franchisee shall provide proof of general liability insurance insuring against claims for liability and damages. The Franchisee shall maintain said insurance through out the term of the franchise and said insurance shall include, at a minimum, the following types of insurance coverage in amounts not less than: Workers' Compensation - \$500,000.00 each accident; Comprehensive General Liability - \$1,000,000.00 per occurrence combined single limit for bodily injury liability and property damage liability; Business Auto Policy - \$1,000,000.00 per occurrence combined single limit for bodily injury liability and property damage liability. The insurance coverage obtained by the Franchisee in compliance with this section shall be on file with and approved by the Risk Management office during the term of the Franchise. The insurance coverage and policy requirements may be changed and increased from time to time at the discretion of the Board to reflect changing liability exposure and limits.

Permanent performance and payment bond: The Franchisee shall within thirty (30) days of the effective date of franchise granted under this ordinance or within thirty (30) days of the granting of a renewal or the transfer of a franchise existing prior to the effective date of this ordinance, furnish to the County a cash deposit, performance bond or an irrevocable letter of credit issued by a Florida bank or a federally insured lending institution in the amount of Two Hundred Thousand (\$200,000.00) Dollars. The deposit performance bond or letter of credit shall be used to guarantee the compliance with performance requirements and payment of all sums which may become due to the County under this ordinance and/or any Franchise Agreement entered into by the County and Franchisee. The deposit,

performance bond or letter of credit shall be maintained in the full amount specified herein throughout the term of the franchise and for one year after the franchise expires or is terminated, without reduction or allowances for any amounts which are withdrawn or paid pursuant to this order the form of the security, whether cash, bond or guarantee, shall be determined by the County Administrator due expressly described in a Franchise Agreement. The rights reserved to the County with respect to the bond or the letter of credit are in addition to all other rights of the County.

The Franchise between the County and Time Warner/Comcast provides that the cable operator post a construction bond in favor of the County in the amount of \$100,000.

Franchise Fees

With respect to payments by a franchisee, the Cable Act permits LFAs to collect up to 5% of gross revenues from cable providers as compensation for the use of public rights-of-way. However, in 2001, the State of Florida adopted the Florida Communications Services Tax (“CST”) Simplification Act, which superseded and preempted the authority of municipalities and counties in Florida to directly levy or collect cable television franchise fees.¹⁶

Under the CST, providers of cable, telephone and other communications services remit the communications tax directly to the Florida Department of Revenue, which takes an administrative fee and remits the balance to the respective LFAs. Rates were established by the State for each taxing jurisdiction based upon historical revenues under prior franchise fee and taxing schemes with the intent that the jurisdictions would not receive net returns significantly different than they received collectively from the prior distinct funding sources.

Enforcement Mechanisms

The County’s Ordinance provides for the following enforcement mechanisms by which we are able to ensure that the cable operator is abiding by its Franchise agreement:

In addition to any other remedies available at law or equity or provided herein, the County may apply any one or combination of the following remedies in the event a Franchisee violates this Ordinance, its franchise agreement, applicable state or federal law, or applicable local law or order: Impose liquidated damages in such amount, whether on a per-diem, per-incident, or other measure of violation, as provided in this Ordinance or in a Franchise Agreement. Payment of liquidated damages by the Franchisee will not relieve the Franchisee of its obligation to comply with the franchise agreement and the requirements of this Ordinance.

16 See Fla. Stat. §§ 202.13(3), 202.20(2)(b)(1)(b), and § 202.24(1).

Impose as liquidated damages a fine in an amount not less than One Thousand (\$1,000.00) Dollars per day for failure to obtain a Franchise Agreement from the County pursuant to this Ordinance.

Impose as liquidated damages a fine in the amount of Three Hundred Fifty (\$350.00) Dollars per day per violation for material failure to comply with any provision of this Ordinance, except as otherwise provided for herein or as otherwise provided for in a Franchise Agreement.

In the event of a material failure to comply with the provision of this Ordinance, revoke the franchise pursuant to the procedures specified in Section XXVI hereof.

In addition to or instead of any other remedy, the County may seek legal or equitable relief from any court of competent jurisdiction.

In determining which remedy or remedies are appropriate, the County shall take into consideration the nature of the violation, the person or persons bearing the impact of the violation, the nature of the remedy required in order to prevent further violations, and such other matters as the County determines are appropriate to the public interest.

Notwithstanding anything to the contrary, Franchisee's failure to comply with Sections XIV, XV and XVI hereof, may result in the assessment of liquidated damages in the amount of Seven Hundred Fifty (\$750.00) Dollars per day for each day such violation continues.

Failure of the County to enforce any requirements of a franchise agreement or this Ordinance shall not constitute a waiver of the County's right to enforce that violation or subsequent violations of the same type or to seek appropriate enforcement remedies.

In any proceeding wherein there exists an issue with respect to a Franchisee's performance of its obligations pursuant to this Ordinance, the Franchisee shall provide such information as it may have concerning its compliance with the terms of the Ordinance. The Board may find a Franchisee is not in compliance with the terms and conditions of this Ordinance and apply any one or combination of the remedies otherwise authorized by this Ordinance or applicable law.

Notwithstanding anything to the contrary, and notwithstanding being subjected to a fine or refund requirement, Franchisee shall be obligated to cure, or take all reasonably practicable steps to cure, any violation of this Ordinance or of any Franchise Agreement granted hereto within thirty (30) business days after receipt of notice from the County of the alleged violation. If the alleged violation is not cured or Franchisee has not taken all reasonable and practicable steps to commence to cure within such period, the County may exercise all rights and

remedies available pursuant to this Ordinance, or applicable law, or the Franchise Agreement.

As previously stated, neither the State nor the Commission has the staff or the budget to respond to violations in a timely manner. In reality, the County gets the telephone calls from the local residents, not the FCC. The County needs and expects a timely response to protect public safety and to ensure local service issues are handled in a timely manner.

Responses/Comments to the Notice of Proposed Rulemaking

The Commission does not have the legal authority to issue rules which preempt LFAs authority.

Providers seeking to provide multichannel video service over upgraded local wireline networks have alleged that the local franchising process serves as a barrier to entry. Accordingly, the FCC seeks comment on how it should implement 47 U.S.C. § 541(a)(1), which provides that a franchising authority may not unreasonably refuse to award an additional competitive franchise. The County respectfully asserts that the Commission should not adopt rules which would preempt its duly-adopted Cable Television Ordinance, since to do so would conflict with Congress' intent and exceed the Commission's Congressionally-delegated authority. Any proposed Commission rule which interfere with the County's Congressionally-granted authority. The Cable Act states, in relevant part:

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter [nor] to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.¹⁷

It was the intent of the Cable Act to "preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects... [and that] the franchise process take place at the local level where County officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."¹⁸ Moreover, Congress provided that where LFAs treated franchisees unreasonably, franchisees had the right to seek judicial relief.¹⁹ Congress did not authorize the Commission to make rules preempting local laws which are not inconsistent with the Act, nor inserting itself into the local franchise negotiation process. Thus, any proposed Commission rule which would circumvent this process would be counter to Congress' express intent that franchising take place at the local level and that any unreasonable denials are reviewed by the judiciary.

¹⁷ See 47 U.S.C. § 556(a)&(b).

¹⁸ See NPRM at n. 18, citing, H.R. Rep. No. 98-934 (1984).

¹⁹ See 47 U.S.C. § 555(a).

The local franchising process is not unreasonably causing refusals of competitive franchise grants.

New providers, including Verizon AT&T and SBC are seeking to provide multichannel video service over upgraded local wireline networks so that they can offer a competitive “triple play” (voice, Internet and video) to cable operators’ triple play. These providers want to circumvent the Cable Act’s local cable franchising process via federal and state legislation and via Commission rules as reflected in this NPRM.

In Florida, these new providers, as telephone companies, have the legal right and ability to deploy an advanced network.²⁰ However, in order to offer the video component, LFAs require a franchise agreement. In fact, a number of years ago, BellSouth had obtained a number of cable franchises which the company failed to build. Therefore, BellSouth never offered cable service even though they held a number of cable franchises.

For example, Verizon has stated that it will deliver its FiOS television service by constructing the system primarily as a telephone system, not subject to cable television franchise authority. Verizon argues that it may begin FTTP system construction at will, even in communities where it is not actively seeking a cable television franchise, because the system will be used to provide voice and data services, which is not regulated by cable television ordinances, regardless of a cable franchise. Therefore, Verizon has been deploying its FTTP network without having yet obtained video franchises from many of the LFAs in the communities in which they are building. In those communities, it can market and use this network to bring its phone and high-speed data products to consumers, and include its wireless product in the bundle. Its video product can join that bundle as Verizon obtains franchise agreements, but there is no legal impediment to construct and begin deriving income from its advanced system while it negotiates video franchise agreements with LFAs.

Thus, these new providers, as telephone companies have an advantage over cable providers since the telephone companies have independent right of way authority and may begin construction or upgrade their facilities without LFA regulation. However, cable operators are not permitted to begin system construction until the franchise agreement is negotiated and finalized.

Build-Out Requirements and Red-Lining

Build out requirements encourage competition and prevent red-lining of communities since these requirements prevent profit optimization by denying new providers the ability to select areas where high-margin customers may reside. LFAs have a congressionally-mandated duty to manage the rights of way to ensure certain members of the community are not denied access to service due to their race or income levels. Accordingly, a Commission rule preventing LFAs from imposing build-out requirements could perpetuate redlining.

The County’s response to Verizon’s arguments

²⁰ See Fla. Stat. §337.401.

Verizon has stated that the local franchising process takes too long due to inertia, arcane application procedures, bureaucracy or inattentiveness by LFAs arguing that it would have to negotiate with 10,000 LFAs in order to offer video service in its current service area. However, entrants, such as Verizon, with multi-use systems have two other options to offer video service without obtaining a franchise from LFAs: satellite and OVS. Furthermore, in the case of obtaining a franchising agreement for use of the rights of way, in Florida, Verizon will be able to reach a significant number of the population by dealing with a relative few LFAs with jurisdiction over the State's various areas of dense population.

Verizon also argues that that local franchising requirements can result in "outrageous demands by some LFAs" wholly unrelated to video services or franchising rationale. However, it is evident that the County's franchising process, with Adelphia illustrates that the parties were able to negotiate in good faith over the exact levels of support to be provided to the County and part of that process was the County's willingness to set forth its justifications for the requests being made.

Elected officials hear from all interested parties, and make a balanced judgment as to what level of support will be required, taking into account the LFA's future cable-related community needs and the provider's ability to make a reasonable profit on its investment in the community.

Conclusion

The County disagrees with the Commission's tentative conclusion that the FCC has the authority to ensure that LFAs not "unreasonably refuse" to award competitive franchises. Congress did not grant the Commission jurisdiction to directly implement §541(a)(1). Accordingly, the Commission does not have enforcement authority since this is a function of the federal judiciary.

As to whether the Commission should address actions at the state level if they are deemed to be unreasonable barriers to entry, the County opposes any such state legislation. There are adequate judicial remedies to redress any unreasonable barriers to entry. The Commission has no authority to preempt state statutes as the NPRM suggested.

Finally, the County agrees with the Commission's tentative conclusion, that it is not unreasonable for an LFA, in awarding a franchise, 1) to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides; 2) allow a cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area, and 3) require adequate assurance that the cable operator will provide adequate access channel capacity, facilities, or financial support.

The County is concerned that its authority as an LFA not be decreased, either by FCC rule or by the Florida Legislature. Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including

maintenance and upgrade of facilities, are undertaken in a manner in accordance with local requirements. Local cable franchising also ensures that the County's specific needs are met and that local customers are protected.

In light of the foregoing, the County respectfully requests that the Commission does not interfere with local government authority over franchising or otherwise impair the operation of the local franchising process as set forth under existing federal law with regard to either existing cable service providers or new entrants. The Commission should not permit providers to simply circumvent the local franchising process.

Respectfully submitted this 13th day of February, 2006

Lee County, Florida



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